



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB 27 1996

REPLY TO THE ATTENTION OF:

CM-29A

MEMORANDUM

SUBJECT: Authority of the Fond du Lac Band to Regulate the
Quality of Reservation Waters

FROM: *Marc M. Radell*
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THROUGH: Gail C. Ginsberg
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TO: Valdas V. Adamkus
Regional Administrator

After reviewing the assertion by the Fond du Lac Band of the Minnesota Chippewa Tribe (the "Band") of the authority to regulate the quality of Reservation waters and the competing claim of jurisdiction raised by the State of Minnesota, the Office of Regional Counsel believes that, under the plan established by Congress in the Clean Water Act, the Band has the authority to regulate the quality of all water resources within the exterior boundaries of the Fond du Lac Reservation. We therefore recommend that, pursuant to 40 C.F.R. § 131.8(c)(4), you determine that the Band has adequately demonstrated that it meets the jurisdictional requirements of 40 C.F.R. § 131.8(a)(3).

Tribal Authority Under the Clean Water Act. Section 518 of the Clean Water Act, 33 U.S.C. § 1377, sets forth Congress' plan for regulation of water resources within Indian reservations and embodies the Congressional intent that tribes regulate all water resources over which they have authority within the exterior boundaries of reservations. Specifically, Section 518(e) authorizes U.S. EPA to treat an Indian tribe "as a state" for the management and protection of those resources, including assumption of the water quality standards program.

Tribes retain attributes of sovereignty over their members and territory to the extent that such sovereignty has not been withdrawn by federal statute or treaty. Iowa Mutual Ins. Co. v.

LaPlante, 480 U.S. 9 (1987). Accordingly, U.S. EPA assumes that tribes have the authority to regulate the activities of their members that may affect water quality and does not require tribes to submit a showing regarding the potential impacts of the activities of tribal members on the quality of reservation waters.

As explained at 56 Fed. Reg. 64,878 (1991), in evaluating whether a tribe has authority to regulate a particular activity on land owned by non-Indians within a reservation, U.S. EPA examines the tribe's authority in light of evolving case law as reflected in Montana v. United States, 450 U.S. 544 (1981), and Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989). In response to uncertainties in these decisions regarding the standard of impact on tribal health and welfare that the activities of non-Indians within reservations must have before a tribe can regulate such activities, U.S. EPA applies as an interim operating rule a formulation of the standard that requires a showing that the potential impacts of regulated activities on the tribe are serious and substantial. However, the Agency believes that the activities regulated under the various environmental statutes it administers generally have serious and substantial impacts on human health and welfare. Furthermore, U.S. EPA has already determined that

because of the mobile nature of pollutants in surface waters and the relatively small size of ... water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee lands within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are (sic) very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality ...

Thus, a tribal submission meeting the requirements of § 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members ... and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets this additional burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of tribal

jurisdiction of fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

56 Fed. Reg. 64,878, 64,879 (1991).

The Fond du Lac Application. On June 14, 1995, the Fond du Lac Band submitted an application to U.S. EPA for "treatment as a state" for the Clean Water Act Section 303 water quality standards and Section 401 certification programs. The application includes a statement supporting the Band's authority to regulate water quality on all waters within its Reservation. [Attachment 1]. The Band asserts that it has authority to regulate water quality pursuant to the Band's inherent sovereignty and the Minnesota Chippewa Tribal Constitution.

The statement of authority accompanying the Band's application and an October 16, 1995, support document [Attachment 2] discuss Tribal uses of Reservation waters and the effects that activities of non-Indians within the Reservation could have on Tribal health and welfare. These documents maintain that

Band members use the Reservation surface waters for which the Band may set water quality standards for a variety of purposes including fishing, stock watering, and public water supply. In addition, surface water quality affects the water quality of reservation groundwater that is a source of drinking water for individual wells of tribal members. Thus, the tribal members could be exposed to pollutants present in, or introduced into, those waters as a result of improper management of water quality or regulation of water pollution sources.

Attachment I, pp. 1 and 2.

Clearly, pollution of Reservation waters from any activity would have a serious and substantial impact on the health and welfare of the Band and its members within the meaning of U.S. EPA's jurisdictional analysis by exposing to pollutants Tribal members using the waters in any of the ways described above. The Band's application and support document also describe specific non-Indian activities that threaten the quality of Reservation waters, such as: ditch systems; private septic systems; pesticide, fertilizer and herbicide use; and gravel pit operations. Any such activity subject to regulation under the Clean Water Act could seriously and substantially affect the quality of Reservation waters and, consequently, the health and welfare of the Band and its members.

Minnesota's Competing Claim of Jurisdiction. On September 1, 1995, the Minnesota Pollution Control Agency ("MPCA") raised a competing claim of jurisdiction regarding the application [Attachment 3].¹ Citing the Montana and Brendale decisions in support of its position, MPCA argues that the Band lacks authority to regulate water quality in the predominantly non-Indian, or "open", areas of the Reservation. Such areas may constitute almost 45 percent of the Reservation and contain a significant proportion of the Reservation's surface waters. Minnesota also asserts that existing State standards adequately protect Tribal interests and that the State has a significant interest in Reservation waters due to presumed State ownership of the water beds.

The Office of Regional Counsel does not believe that any of MPCA's arguments demonstrate a lack of Tribal jurisdiction over non-Indian activities within the Reservation. In analyzing jurisdictional issues in light of the Montana and Brendale decisions, U.S. EPA looks to the potential effects of non-Indian activities on Tribal health and welfare, not to the open or "closed" (predominantly Indian) character of the area. In the Brendale case, only two justices found the open or closed nature of the location of the non-Indian activity dispositive of the jurisdictional issue. The other justices applied the Montana test. The four justices who found that the Yakima Indian Nation did not meet the Montana test based their opinion on a District Court finding that the non-Indian activity at issue would have no direct effect on the Tribe and would not threaten the Tribe's political integrity, economic security or health or welfare. The three justices who found that the Yakima Indian Nation did meet the Montana test based their opinion on their own finding that the non-Indian activity at issue would have a direct effect on the Tribe's political integrity, economic security or health or welfare. In this case, the Fond du Lac Band has demonstrated that the relevant activities of non-Indians, even in open areas of the Reservation, present a serious and substantial threat to

¹ During the State comment period for the application, the Region and MPCA discussed the appropriate role of comments made by local governments. In keeping with the policy set forth at 56 Fed. Reg. 64,884 (1991), U.S. EPA does not consider local governments' comments about tribal applications unless their comments are incorporated by the State. MPCA's comment letter includes as attachments comments from St Louis and Carlton Counties. The Counties raise two issues in opposition to approval of the Band's program: jurisdiction over non-Indian activities within the Reservation and application of the Band program off-reservation. This opinion discusses jurisdiction over non-Indian activities in the context of MPCA's comments. Since the Band applied for, and U.S. EPA has the authority to approve, a water quality standards program for only waters within the Reservation, the Band program will not apply to off-reservation activities. Issues regarding any specific off-reservation activity that may be indirectly affected by the Band program should be raised during the permit process for that activity.

the quality of Reservation waters and, thence, to Tribal health and welfare.

Neither can we agree with MPCA that, before the Band can regulate non-Indian activities within the Reservation, it must demonstrate that Minnesota's water quality standards do not adequately protect the Band's health and welfare. Even if such a test did exist, the Fond du Lac application and draft water quality standards identify at least two uses of surface water, for traditional Native American spiritual practices and for wild rice production, not formally protected by the State in its water quality program.²

U.S. EPA need not conclusively answer the questions of whether the State retains title to the beds of navigable waters within the Fond du Lac Reservation and the extent of any State jurisdiction arising from such ownership. Even if the State does hold title to water beds within the Reservation, U.S. EPA could properly conclude that the Band has adequate civil regulatory authority over water resources on the Reservation to establish water quality standards under Section 303 of the Clean Water Act. As discussed above, the Fond du Lac Band has regulatory authority over all members of the Band and has demonstrated authority over the activities of non-members on non-member lands within the Reservation for the purposes of establishing water quality standards. This demonstration of authority over the activities of non-members extends to activities on any non-member lands within the Reservation, even water beds, because any such activities that impair water quality would likely have a serious and substantial effect on the health and welfare of the Band. Thus, the Band possesses inherent authority over all persons on the Reservation who may engage in activities that might affect the quality of Reservation waters, regardless of whether or not the State retains title to the water beds.

Finally, MPCA raises two Reservation boundary issues: 1) jurisdiction over waters, such as the St. Louis River and Spring Lake, shared by the Band and State; and 2) specific comments concerning the legal descriptions of individual water bodies. The Band's jurisdiction includes those portions of common waters that lie within the exterior boundaries of the Reservation. Section 518(d) of the Clean Water Act allows Tribes and States to enter cooperative agreements to jointly plan and administer water programs. Such an agreement could address how MPCA and the Band will administer their water quality standards programs on shared bodies of water. The Office of Regional Counsel is referring MPCA's specific comments concerning the legal descriptions of individual water bodies to the U.S. Department of the Interior.

² The State has addressed some tribal concerns through guidance and other non-enforceable means.

Such issues pertain to implementation of the program and need not be resolved prior to program approval.

Conclusion. Based upon the showing by the Fond du Lac Band that all the waters within the Reservation are used by the Band and the assertion by the Band that impairment of such waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the Band, the Office of Regional Counsel determines that the Band has made an adequate showing of jurisdiction over non-Indian activities within the Reservation for purposes of water quality standards and certification program authorizations. We also conclude that no other governmental authority has demonstrated a lack of jurisdiction on the part of the Band.

We therefore recommend that, pursuant to 40 C.F.R. § 131.8(c)(4), you determine that the Fond du Lac Band has adequately demonstrated that it meets the jurisdictional requirements of 40 C.F.R. § 131.8(a)(3) for regulation of all water resources within the Reservation under the water quality standards and certification programs. We also recommend that you encourage MPCA and the Band to enter a cooperative agreement under Section 518(d) of the Clean Water Act for implementation of water quality standards programs on shared bodies of water and offer the assistance of the Region throughout the process.

Attachments

cc: Jo Lynn Traub

bcc: ✓ C. Johnson-Schultz, W-15J
K. Ambutas, M-14J
E. Fairbanks, M-14J
J. Havard, OGC

ENCLOSURE 1

STATEMENT OF FOND DU LAC TRIBAL AUTHORITY
TO REGULATE WATER QUALITY

I. BASIS OF AUTHORITY

The Fond du Lac Band is part of the Minnesota Chippewa Tribe, a federally-recognized Indian tribe organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. Section 476. The Fond du Lac Reservation was set aside by the Treaty with the Chippewa of 1854..

The Fond du Lac Band is governed by the Minnesota Chippewa Tribe Constitution and By-laws, adopted in 1963, and approved by the U.S. Department of Interior in 1964, which delegates governing authority for each of the six constituent reservations and reservation business committees or tribal councils. The federal act for the organization of Indian tribes is set forth in 25 U.S.C. 476 et. seq.

The Fond du Lac Band derives its authority to regulate and set water quality standards applicable to the entire reservation from its inherent powers as a sovereign including its power to protect the health and safety of all persons within the boundaries of the Reservation. The sovereign power of the Band is recognized in the Commerce Clause to the U.S. Constitution and in well-established principles of Federal Indian Law as set forth in opinions of the U.S. Supreme Court. See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); Williams v. Lee, 358 U.S. 217 (1959); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); United States v. Wheeler, 435 U.S. 313, 327 (1978); Montana v. United States, 450 U.S. 544, 564-66 (1981); Merrion v. Jicarilla Apache Band, 455 U.S. 324, 334 n.16 (1983); National Farmers Union Ins. Co. v. Crow Band, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); Brendale v. Confederated Bands and Bands of the Yakima Nation, 492 U.S. 408 (1989).

The U.S. Supreme Court has also recognized the rights of Indian lands to the use of water which arise on, border, traverse, underlie or are encompassed within an Indian Reservation whether created by treaty, agreement, executive order, congressional act, or secretarial order. See, Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963).

In addition, the Fond du Lac Band has delegated authority by virtue of the Minnesota Chippewa Tribe Constitution:

The Reservation Business Committee shall be authorized to manage, lease, permit or otherwise deal with tribal lands, interest in lands or other tribal assets, when authorized to do so by the Reservation Business Committee but no such authorization shall be necessary in the case of lands or assets owned exclusively by the Reservation. Constitution and By-laws of the Minnesota Chippewa Tribe, Article VI, Section 1(c).

Band members use the Reservation surface waters for which the Band may set water quality standards for a variety of purposes including fishing, stock watering, and public water supply. In addition, surface water quality affects the water quality of reservation groundwater that is a source of drinking water for individual wells of tribal members. Thus, the tribal members could be exposed to pollutants present in, or introduced into, those waters as a result of improper

management of water quality or regulation of water pollution sources. For this reason, and the fact that the mobile nature of pollutants in surface and ground waters makes it practically very difficult to separate out the effects of water quality impairment on non-Indian fee land from those on tribal portions, the Band finds that establishment of tribal water quality standards for reservation waters including waters on non-Indian fee lands, is necessary to proper management of reservation water quality and protection of tribal health and welfare.

In addition, the Band finds that the potential impact on tribal members of improperly regulated water quality is so significant that it meets not only the Montana test but also the interim operating rule adopted by EPA, requiring tribes to show "that the potential impacts of regulation activities on the Band are serious and substantial." 56 Fed. Reg. 64, 878 (1991). Reservation waters and critical habitat are subject to protection under the Clean Water Act, in part because improperly regulated water pollution can have serious and substantial impacts on human health and welfare. EPA states that the activities regulated under the various EPA statutes "generally have serious and substantial impacts on human health and welfare." Similarly, the potential impact on the health and welfare of tribal members from improperly regulated sources of pollution is so serious and substantial that appropriate water quality management and regulation by the Tribal Governor is necessary under tribal law and the Clean Water Act.

II. DOCUMENTS

Copies of the following relevant documents support the Band's authority are attached:

Attachment A. Tribal Council Resolution

Attachment B. Treaty with the Chippewa, 1854

Attachment C. Constitution and By-laws